

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

Case No. 8:03-cr-77-T-30TBM

v.

SAMI AMIN AL-ARIAN,
SAMEEH HAMMOUDEH,
GHASSAN ZAYED BALLUT,
HATIM NAJI FARIZ
Defendants.

_____/

**SAMI AL-ARIAN'S COMBINED MOTION TO DISMISS COUNTS 1,2,3, & 44
AND MEMORANDUM RE:PRE-INDICTMENT DELAY AND DESTRUCTION
OF EVIDENCE**

COMES now the Accused Dr. Sami Al Arian, by counsel, and moves this Honorable Court for the entry of an Order dismissing the above captioned indictment against the accused. As grounds for the aforesaid, the Accused avers the following, to wit:

- a) That the United States in bad faith has intentionally delayed the Indictment in this matter for the purpose of gaining a tactical and strategic advantage over the Accused in this matter.
- b) That such intentional delay has and continues to prejudice the Accused's ability to defend himself in violation of the Accused's 5th Amendment Rights to Due Process.

- c) Further, that the purposeful and lengthy delay here has substantially affected the Accused's rights to effectively defend himself against the charges in violation of the Sixth Amendment.
- d) Finally, in addition to the delay in this matter, the destruction of evidence in this case coupled with the substantial pre indictment delay involved in this matter severely prejudices this Accused's ability to obtain a fair trial in violation of his Fifth and Sixth Amendment rights.

FACTS

On February 20, 2003, Dr. Al-Arian was indicted along with 3 other individuals by a grand jury in Tampa, Florida. The Indictment charged 4 conspiracies:

- a) Count 1: Conspiracy to Commit Racketeering;
- b) Count 2: Conspiracy to Murder, Maim or Injure Persons at places outside the United States;
- c) Count 3: Conspiracy to Provide Material Support; and
- d) Count 4: Conspiracy to Make and Receive Contributions of Funds Goods or Services.

The conspiracy charged in Count (1) dates from 1984; the Count (2) conspiracy dates from 1988; likewise the count (3) conspiracy dates from 1988.¹

For purposes of this motion we will direct our attention to the Count One conspiracy because Counts (2) and (3) have considerable overlap.

¹ The statute upon which Count (3) is based is 18 U.S.C. 2339 (a), which was not promulgated until 1994, yet the conspiracy is alleged to have begun in 1988.

On September 21, 2004, the initial indictment of Dr. Al-Arian was superseded by a new indictment. The Conspiracy charges on this new indictment paralleled those of the earlier indictment in that the conspiracies charged were the same. Nevertheless, the new indictment expands the number of co-defendants and adds new overt acts, among other things. The number of overt acts increased from 256 to 324. However, the beginning date for the conspiracies remain the same.

An overview of the indictment establishes 138 of the overt acts occurred prior to January 23, 1995, the date of Presidential Executive Order 12947. A total of 241 of the overt acts occurred prior to October 8, 1997, the date of the designation of the Palestinian Islamic Jihad and Hamas as Foreign Terrorist Organizations (FTO). A sum total of 238 of the overt acts occur prior to the 1995 search.

SEARCH AND SEIZURE

Pursuant to a search warrant affidavit authored by William West in November 17, 1995, Dr. Al-Arian's home, office at the University and school, were searched. This search literally emptied the Accused's home and office. Virtually every piece of paper in the possession of the Accused was seized. This included, among many other items, school papers, nearly all the books and periodicals that were in the home and office, dated grocery receipts, scores of personal home family videos and a book of poetry written by Dr. Al-Arian at the age of 17.

Much of what was seized in 1995 forms the basis of the government's documentary evidence in the current matter. If it stopped there, it might be interesting and merely another source of facts to support this motion. However, like much of this case, it gets stranger. In 1996, the government returned to Dr. Al-Arian much of the materials it seized during the search of 1995. Items were copied and returned to the Accused and other items were directly returned to the Accused.

In 2003, a second search of Dr. Al-Arian's home and office took place. In bad faith, the affiant failed to disclose to the Magistrate that many of the items that they sought to seize in 2003 were items that they had previously seized and returned to the accused in 1996.

DESTRUCTION OF THE EVIDENCE

From 1993 forward, the F.B.I. was monitoring the Accused through electronic surveillance via F.I.S.A. wiretaps. According to the 2003 search warrant affidavit of Agent Myers:

The FBI received court authority to establish electronic surveillance on the residential telephone lines of defendant Al-Arian and defendant SHALLAH, as well as the telephone lines of the cover enterprises WISE and ICP in 1993 and 1994 based on their connections to the PIJ. This electronic surveillance revealed that defendants Al-Arian, Shallah, and Hammoudeh were actively involved in the PIJ, WISE, ICP, and IAF. Court approved electronic surveillance on numerous telephone lines belonging to the co-conspirators and defendants and the terrorist cover organizations began on December 27, 1993. Monitoring of telephone lines and facsimiles transmissions began on the residential lines of defendant Sami Al-Arian in 1993. Monitoring also occurred on a business and facsimile line at WISE-ICP, which were co-located. Following the November 1995 search discussed below, defendant Al-Arian moved these same WISE/ICP telephone lines to IAF where the FBI continues to intercept telephone calls at the present time. The FBI also received authority to intercept telephone calls at defendant Ramadan Shallah's

residence until he left Tampa, Florida in 1995, before he became the Secretary-General of the PIJ at its headquarters in Damascus, Syria. Court approved electronic surveillance of defendant Sameeh Hammoudeh's residence was established in 1999 and continues at the present time. Monitoring of defendant Hatim Fariz's telephone lines began in 2002 and also continues at this time.

Also according to the 2003 search warrant affidavit, "virtually all the telephone conversations that were monitored and seized by the government were in Arabic."

See paragraph 20 of 2003 Search Warrant Affidavit by Agent Myers.

Prior to and during the entire period of the wiretaps, Dr. Sami Al-Arian was engaged in political efforts on behalf of the Arab community. These efforts involved numerous contacts with members of the political community, members of the House and Senate, Staffers, members of the Executive Branch, including Presidents staffers, campaign committee members and chairs. All of these conversations were in English. Many, if not all of these conversations are exculpatory in light of the charges as alleged in the overt acts of the Indictment.

Despite the fact that the Accused contends that there should be numerous hours of conversations with individuals described above, it does not appear that these conversations were preserved and maintained.² Perhaps they were minimized as not relevant to the then ongoing intelligence investigation. Perhaps they were minimized to avoid embarrassing these political personages with whom Dr. Al-Arian had contact. However, the fact is that the government exploits the absence of these conversations by alleging in the superceding indictment, paragraph 41:

² The defense has been able to locate a minimum amount of these conversations thus far in the tech cut summaries.

The enterprise members, while concealing their association with the PIJ would and did seek support from influential individuals in the United States under the guise of promoting and protecting Arab rights.

Because of the delay in the indictment, the Accused is now required to utilize his memory to make an effort to remember an 11-year course of civic activism on behalf of the Arab American.

EMAILS

The Accused is further prejudiced by the fact that many of his early emails cannot be recovered because of the delay in the indictment. These emails, like his phone conversations established exactly what Dr. Al Arian was doing in the political realms and like the phone conversations are likely to be exculpatory. Much of the Accused's email traffic was on early model Macintosh computers, which, as a result of the government's 9-year delay in bringing this indictment, cannot now be opened. Additionally in this regard, at least one of the Macintosh computers was returned to the Accused. Upon its return, the Accused determined the computer was broken. Because the government had returned the computer, and returned no indictment, the Accused did not see a need to keep it and discarded it.

The information that was on these computers cannot now be recovered. Nor does it appear that because of the passage of time can any of the still available Macintosh computers provide any evidence, since most of the software is antiquated.

MAZEN AL-NAJJAR

In 2000, 5 years after the searches of Dr. Al-Arian's home, office, and WISE, the government began deportation proceedings against Mazen Al-Najjar (Najjar). The government suddenly decided it was more important to deport Najjar, a co-conspirator in a conspiracy to commit murder and extortion, than to prosecute him. Much, if not all of the evidence utilized in his immigration hearing against Najjar was the product of the 1995 search.

The affiant for the search warrants in 1995, William West, was the primary witness against Najjar in the deportation hearings. Many of the allegations that form the basis of the conspiracies alleged in counts (1) through (4) are the same allegations that lead to the deportation of Najjar. These allegations are just repackaged now into conspiracies, which now subject the Accused to potentially life in prison, rather than deportation.

Government May Not Abuse the Grand Jury In Order To Gain Unfair Advantage at Trial

Even more sinister, there is the fact the government, in the superceding indictment chose to add Najjar as a defendant after choosing to deport him in 2000. It is clear that the addition of Najjar as a defendant was a transparent attempt crafted by the government to avoid the consequences of using a grand jury to investigate a currently pending indictment.

While the law grants the grand jury broad pre-indictment investigatory powers, the Government may not use the grand jury's powers to prepare an already pending indictment for trial. *United States v. Alvarez*, 812 F. 2d 668, 670

(11th Cir. 1987); *Beverly v. United States*, 468 F. 2d 732,743 (5th Cir. 1972). To continue to use legitimate pre indictment investigatory powers beyond that purpose and against an individual who has already been charged is “illogical and abusive.” *Alvarez*, 812 F.2d at 670. To separate the proper from the improper uses of the grand jury, courts have held that the test is whether the prosecutor’s sole or “dominant” purpose in using the grand jury is to prepare an already pending indictment for trial. *Simels v. United States*, 767 F. 2d 26, 29 (2d Cir. 1985); *Beverly*, 468 F.2d at 743. Thus, if the prosecutor’s “dominant” purpose is to obtain discovery, “lock in” the testimony of witnesses, or otherwise prepare for trial, the conduct is abusive and improper.

In this case, every fact that forms the basis of Najjar’s indictment for 4 conspiracies was known to the government by at least 2000, if not by 1995. Najjar’s relationship to Sami Al-Arian was publicly known by 1995. The government chose to deport Najjar, *making him unavailable*, then indicted him on information it possessed as early as 1995, requiring this Accused to spend time defending Najjar, with Najjar unavailable to defend himself.

The bad faith is *palpable* here. By delaying this indictment, the government has been permitted to manipulate charges, deport defendants, and waste evidence, all to their tactical advantage.

**COUNT 44 IS ILLUSTRATIVE OF THE GOVERNMENT'S IS
ILLUSTRATIVE OF THE GOVERNMENT'S PURPOSEFUL DELAY IN
BRINGING THESE CHARGES**

Count 44 of the current indictment charges that in 1993 and 1994, the Accused attempted to procure citizenship or naturalization unlawfully. This charge was among the charges contemplated by the 1995 search by William West;

“Among the possible criminal violations that your affiant is investigating are: false statements to a Department of the United States in violation of title 18 United States Code 1001; false statement relating to naturalization”.

Ostensibly, the warrant issued in 1995 garnered all the material necessary to support this charge. Yet no charge was brought; in addition, because the search of the Accused's premises in 1995 was not confined to the strictures of the warrant, thereby permitting the F.B.I. to illegally seize items, which formed the basis for the search in 2003.

Also presented to the FGJ was evidence seized in a November, 1995 search of defendant Sami Al-Arian's home and office at the University of South Florida (USF), Tampa, Florida. Evidence presented to the FGJ also included documents seized during the 1995 search of the terrorist front organizations, WISE and ICP, which were co-located in Tampa, Florida as well as extensive financial records obtained by federal grand jury subpoenas. Information from documents obtained by treaty requests served upon foreign governments was also presented to the FGJ. Affidavit of S.A. Kerry L. Myers, 2003 Search Warrant Affidavit.

Thus for 9 years, the government was in possession, custody, and control of the materials that support count 44.

The government has urged in the superceding indictment that Dr. Al-Arian and his co-conspirators were members of a conspiracy whose members and associates engaged in acts of violence including murder, extortion, money laundering, and fraud, misuse of visa, and operated worldwide, including in the

Middle District of Florida. To believe the government's assertions along these lines is to believe that the United States government sat idly by while people who it knew were engaged in the conduct described above continued to ply their trade of murder, extortion, and the like for *9 years after the search in 1995*. The government simply cannot have it both ways.

Either these defendants were dangerous and needed to be stopped, or much more likely, these Accused constituted about as much of a threat to the United States as the average American walking the streets daily. The government, intentionally and in bad faith, delayed this indictment for 9 years and that has resulted in serious prejudice to the defense.³

CONCLUSION

For the foregoing reasons and any others as may arise, we ask that this Court dismiss the indictment.

Dated: 29 October 2004

Respectfully submitted,

/s/Linda Moreno

LINDA MORENO, ESQ.
1718 E. 7th Avenue
Suite 201
Tampa, Florida 33605
Telephone: (813) 247-4500
Telecopier: (813) 247-4551
Florida Bar No: 112283

WILLIAM B. MOFFITT, ESQ.

³ The attempt to prepare a case where the sheer volume of materials that were produced by a wiretap that was on 5 defendants and lasted 10 years itself tests the outer limits of due process.

(VSB #14877)
Cozen O'Connor
1667 K Street, NW
Washington, D.C. 20006
Telephone: (202) 912-4800
Telecopier: (202) 912-4835

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of October, 2004, a true and correct copy of the foregoing has been furnished, by CM/ECF, to Walter Furr, Assistant United States Attorney; Terry Zitek, Assistant United States Attorney; Kevin Beck, Assistant Federal Public Defender, M. Allison Guagliardo, Assistant Federal Public Defender, counsel for Hatim Fariz; Bruce Howie, Counsel for Ghassan Ballut, and by U.S. Mail to Stephen N. Bernstein, P.O. Box 1642, Gainesville, Florida 32602, counsel for Sameeh Hammoudeh.

/s/ Linda Moreno
Linda Moreno
Attorney for Sami Al-Arian

